

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1222

COMMONWEALTH

vs.

MARCUS GIOTTO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was convicted by a Superior Court jury of two counts of indecent assault and battery on a person with an intellectual disability in violation of G. L. c. 265, § 13F. Specifically, the jury found the defendant guilty of indecently kissing his autistic stepdaughter (count one) and touching her breast (count two).¹ In a motion for new trial, the defendant claimed that newly discovered evidence of the victim's posttrial recantation cast real doubt on the justice of the conviction. In a comprehensive written decision, the trial judge allowed the motion for new trial as to count two, but denied it as to count one. On appeal, the defendant claims that the denial of the

¹ The jury acquitted the defendant of indictments alleging that he indecently touched the victim's vagina and indecently touched the victim with his penis. The jury also acquitted the defendant of one count of open and gross lewdness.

motion for new trial on count one was an abuse of discretion.
We affirm.

Background. At the time of the trial, the victim was a twenty-five year old woman who was on the autism spectrum and functioned at the level of an eleven year old. At trial she testified that the defendant, her fifty-one year old stepfather, touched her inappropriately on multiple occasions. She explained that when the defendant took her out for a meal, he rubbed his hand against her vagina and her breast as he helped her buckle her seatbelt. According to the victim, he touched her in the same way on multiple occasions when she slept over at her mother's house. The victim also testified that the defendant repeatedly kissed her on the lips and asked her to "keep [her] mouth open."

The defendant testified at trial and admitted that he had kissed the victim two or three times on the mouth, but that they were intended as nothing more than "pecks." He denied that he touched her breasts or vagina, and denied ever exposing his penis to the victim. Ultimately, the jury convicted the defendant of the indictments alleging that he kissed the victim on the mouth and touched her breast over her clothing, but acquitted the defendant of the indictments alleging that he touched her vagina and that he touched her with his penis.

Approximately five months after the verdict, the victim's maternal grandmother contacted the police and explained that the victim had recanted her testimony. In a subsequent interview, the victim told the police that she had lied at trial about the defendant touching her, and that her father and sisters had told her what to say. Less than a month later, the victim withdrew her recantation, explaining, among other things, that she felt responsible for dividing the family and was motivated to recant her testimony because she wanted to restore peace in the family. The victim reaffirmed that she had told the truth during the trial.

Discussion. A judge "may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). "A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." Commonwealth v. Grace, 397 Mass. 303, 305 (1986). "The evidence said to be new not only must be material and credible . . . but must also carry a measure of strength in support of the defendant's position." Id. We examine the judge's conclusion that the defendant did not meet his burden of demonstrating entitlement to a new trial on the ground of newly discovered evidence "only to determine whether there has been a significant

error of law or other abuse of discretion." Id. at 307. We extend special deference to the motion judge where, as in this case, he was also the trial judge. Id.

In assessing the impact of the victim's recantation and withdrawal, the judge noted that "[t]he whole case turned on credibility, corroboration and alleged influence by family members." As to the victim's uncorroborated allegation that the defendant had touched her breast, the judge found that the recantation probably would have been a real factor in the jury's deliberation. The judge allowed the motion for new trial on that indictment and the Commonwealth has not appealed. However, the judge denied the motion for new trial as to the conviction for kissing the victim on the mouth based on independent evidence supporting that conviction. We see no reason to disturb the judge's order.

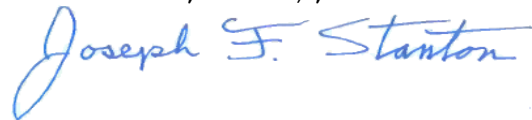
First, the judge relied on the testimony of the first complaint witness whom he described as "very credible and effective." The first complaint witness described the victim as "trembling and visibly upset" when she described how the defendant had kissed her. Significantly, the victim's first complaint, which was limited to a description of the defendant kissing her on the mouth, came before any possible family influence or coaching. Second, the judge relied on the defendant's admission that he had kissed the victim on the

mouth. The judge stated, "Perhaps most important, the defendant himself corroborated the victim's account of the indecent kissing in major respects both on the stand and at a family meeting before the indictments." In these circumstances, where the judge was called upon to decide whether the alleged recantation cast real doubt on the justice of the conviction, the judge appropriately considered this independent corroborating evidence. Bearing in mind the deference owed to the judge on these matters of credibility, Grace, supra at 307, we discern no abuse of discretion in the denial of the motion for new trial on count one.

Judgment on count one
affirmed.

Order denying motion for new
trial on count one
affirmed.

By the Court (Blake, Kinder &
Desmond, JJ.²),



Clerk

Entered: June 25, 2019.

² The panelists are listed in order of seniority.